

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

Petition of Vaya Telecom, Inc. for)
Declaratory Ruling Regarding) CC Docket No. 01-92
LEC-to-LEC VoIP Traffic)

COMMENTS OF NORTH COUNTY COMMUNICATIONS CORP.

Pursuant to the DA 11-1561, North County Communications Corp. (“NCC”), a California CLEC, by and through its undersigned counsel, submits its comments on the Petition of Vaya Telecom, Inc. (“Vaya”) for Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic (“Petition”).

I. INTRODUCTION AND SUMMARY

Vaya’s inconsistent public descriptions of the nature of its traffic bring into question whether Vaya’s traffic qualifies for the treatment Vaya seeks. In addition, Vaya has not demonstrated that the traffic fits within the Commission’s end-to-end analysis applied to ISP-bound traffic.

Vaya is engaged in a multi-stage effort to avoid paying for call termination. Self-proclaimed “IP-enabled” carriers like Vaya threaten to undermine the entire intercarrier compensation system. A call is a call. There is no reason for a different termination rate to apply to a call, whether it is TDM, ISDN, or VoIP.¹ Sprinkling a call with a bit of IP fairy dust should not permit a carrier to change the call’s jurisdiction. Vaya’s Petition stretches

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Vaya refers to its traffic as Internet-enabled traffic. That description is a mischaracterization. The traffic is Voice over Internet Protocol, and such traffic can exist without ever touching the public Internet.

² Based on Vaya’s arguments, which contradict Vaya’s position in its Petition, the Court has ~~Mayed the case pending as Internet-enabled traffic. That description is a mischaracterization. The traffic is Voice over Internet Protocol, and such traffic can exist without ever touching the public Internet.~~ Based on Vaya’s arguments, which contradict Vaya’s position in its Petition, the Court has Mayed the case pending as Internet-enabled traffic. That description is a mischaracterization. The traffic is Voice over Internet Protocol, and such traffic can exist without ever touching the public Internet.

the Commission's ISP decisions to a breaking point, and the Commission should not issue the requested ruling.

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II. VAYA'S PREVIOUS ASSERTIONS IN CALIFORNIA STATE COURT AND TO THE COMMISSION CONTRADICT ITS CURRENT STATEMENTS

Vaya asserts that its traffic "has the same characteristics" as ISP-bound traffic. Pet. at 4. That description must be questioned in light of Vaya's recent pleadings in California Superior Court. *See NCC v. Vaya*, Superior Ct. of Cal., San Diego Co., Case No. 37-2011-00083845-CU-BC-CTL (filed Jan. 14, 2011).² In that matter, Vaya urged the Court to "defer to the jurisdiction of the CPUC" to examine the reasonableness of NCC's intrastate tariffed local termination rate, which NCC sought to impose on Vaya's traffic terminating to NCC's network. *See Vaya Demurrer to NCC Complaint ("Demurrer")* at 3, 5-6 (see attached Exhibit A).

When confronted with CPUC decisions that found intrastate ISP-bound traffic is subject to CPUC-approved intrastate tariff termination rates (a series of cases referred to as the *Pac-West* cases), Vaya averred that its traffic was not like ISP-bound traffic:

"While [the *Pac-West*] decisions support NCC's general theory that one CLEC may collect tariffed termination rates from another CLEC, the [Pac-West] decisions all involve ***the exchange of traffic for internet [sic] service providers*** (dial-up internet [sic] service) which ***involves traffic distinguishable from the present action.***" *Demurrer* at 19 (emphases added).

In addition to stating its traffic is not like ISP-bound traffic, Vaya declared that ***all*** of its traffic in California is ***intrastate***. *See Vaya Reply to NCC Opposition to Demurrer*

² Based on Vaya's arguments, which contradict Vaya's position in its Petition, the Court has stayed the case pending referral to the California Public Utilities Commission ("CPUC").

(“Demurrer Reply”) at 3-4 (see attached Exhibit B). Vaya stated that the CPUC has jurisdiction over Vaya’s traffic and cited *MetroPCS Cal., LLC v. FCC*:

“...allowing state agencies to set intrastate termination rates furthers federal policy of encouraging and compensating interconnection while retaining the dual regulatory structure created by subsections 152(a) and (b) of the Communications Act.” 644 F.3d 410 (D.C. Cir. 2011).

Vaya knows that it must pay carriers to terminate its traffic. Indeed, Vaya criticized non-paying carriers in this same Commission docket. On April 1, 2011, Vaya filed public comments with the Commission regarding intercarrier compensation: “reciprocal compensation *or access charges* must apply to all calls, regardless of whether or not the terminating carrier has an agreement with the originating LEC, IXC, or CMRS provider.”³ (Emphasis added.) Vaya went on to request that the Commission “make clear that carriers terminating traffic...are entitled to compensation.” *Id.* at 15.

Furthermore, Vaya bemoaned “improper forms of carrier self help,” including “non-payment of access charges.” *Id.* at 19. Vaya noted correctly that “[c]arriers are increasingly refusing to pay any intercarrier compensation charges to which they object,” and that “carriers delivering traffic have every incentive to engage in self-help and simply to refuse to pay a [...] terminating carriers’ invoiced *access* charges.” *Id.* at 20. (Emphasis added.) Vaya explained further that, during disputes, “the non-paying carrier retains the disputed amounts, while the terminating carrier receives no compensation.” *Id.* Remarkably, while Vaya damned self-help, it was engaging in the same self-help against NCC. To date, Vaya

³ See O1 and Vaya Comments, In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, NPRM and FNPRM, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 14 (filed Apr. 1, 2011).

has not paid a penny to NCC. Clearly, when the payment obligation falls on Vaya, the company has no qualms engaging in self-help.⁴

On the one hand, Vaya claims to the Commission that “on an end-to-end basis, the communications exchanged between Vaya and other LECs *can* begin anywhere in the country or world before they are delivered to the ultimate called party.” Pet. at 4. On the other hand, Vaya informs the California State Court that all of Vaya’s traffic in California *is* intrastate. Demurrer Reply at 3. Furthermore, Vaya argues for state regulation out of one side of its mouth, while from the other side, it seeks to have the federal government control all aspects of its service offerings, including state-regulated LECs’ rights to compensation for terminating the traffic.

Vaya quickly changes positions to avoid its payment obligations. Vaya’s Petition is simply another about-face in a series of switches designed to frustrate the compensation rights of carriers that terminate Vaya’s traffic, and the Commission should not grant the requested ruling.

III. VAYA MISCHARACTERIZES THE COMMISSION’S ISP ORDERS

Despite flip-flopping on the characterization of its traffic as intrastate and interstate, Vaya asks the Commission to declare its traffic jurisdictionally interstate. Vaya’s end-to-end analysis, however, does not withstand scrutiny.⁵ Vaya admits that it sends its traffic to the Public Switched Telephone Network (“PSTN”) for delivery to intended recipients. Once the call is handed to the LEC, it resumes its path on the PSTN. And once on the PSTN, the termination required of the LEC is like the termination of any other voice telephone call.

⁴ Vaya claims to provide low-cost transport; however, it is able to do so only by ignoring its obligations to pay terminating carriers for access to their networks. Vaya’s argument that it “is able to offer competitive rates and high-quality services” is disingenuous and misleading. Vaya refuses to pay carriers any money for terminating Vaya’s calls.

⁵ Vaya claims that it “only sends traffic to the PSTN that originates on IP-enabled devices.” Pet. at 2. NCC’s analysis of traffic received from Vaya indicates that Vaya serves as a wholesale carrier for non-IP carriers.

Contrary to Vaya's assertions, it is not "well-settled" that traffic exchanged between LECs that "implicates the Internet" is jurisdictionally interstate traffic. Vaya merely adds a small IP component to traffic in an effort to avoid access or other termination charges. The current rules are clear: the jurisdiction of a call is based on an end-to-end analysis of that call by examining the originating and terminating ANIs. The ANIs determine whether the call is local, intrastate or interstate. In the event an ANI is unavailable, the indeterminate traffic is categorized based on carriers' declarations of jurisdictional percentages.

Vaya fails to point out that VoIP traffic is markedly different from dial-up Internet traffic. As noted in the *ISP Remand Order*, using the end-to-end analysis, the Commission has determined that the end point of a call to a dial-up ISP continues on to the worldwide web, thus making the call interstate in nature. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶14 (2001) ("*ISP Remand Order*") (cite). In the case of VoIP traffic, the call terminates with a voice end user.⁶ VoIP traffic does not necessarily traverse the worldwide web, and it most definitely does not continue on past the point where the LEC terminates the call.⁷

As Vaya admitted to the California State Court, its California traffic is intrastate. Demurrer Reply at 3. Vaya has decimated its own argument. Based on (i) Vaya's admission, (ii) the reality that VoIP traffic terminates with a voice end user and does not continue one, (iii) the fact that the jurisdiction of a VoIP call can be determined by ANIs, and (iv) the lack of arbitrage concerns with respect to VoIP traffic, the Commission cannot

⁶ Vaya has admitted that its traffic – at least in California – is intrastate. Demurrer Reply at 3. The Commission cannot grant the requested ruling in light of Vaya's admittedly incorrect hypothetical.

⁷ Moreover, the Commission's concern in its *ISP Remand Order* regarding potential arbitrage by LECs targeting ISPs does not exist in the case of LECs terminating VoIP or any other type of voice calls to their end users. *See also Core Communications, Inc. v. FCC*, No. 08-1365 (D.C. Cir. 2010) (noting the central concern and stating that "[t]he [FCC's 2008 ISP Remand Order] arises out of the Commission's concern with the results of applying the reciprocal compensation system to ISP-bound traffic" – *i.e.*, arbitrage opportunities).

determine that VoIP traffic is like ISP-bound traffic or is otherwise interstate in nature. Accordingly, the Commission cannot exercise authority to regulate the termination charges to be imposed on Vaya's traffic.

An effort to squeeze VoIP traffic, in general, and Vaya's traffic, in particular, into the same intercarrier compensation regime that applies to ISP-bound traffic will step on the rights of states like California to regulate intrastate telecommunications. Indeed, as the Commission has recognized and as the D.C. Circuit explained in *MetroPCS*, "allowing state agencies to set intrastate termination rates furthers federal policy of encouraging and compensating interconnection while retaining the dual regulatory structure created by subsections 152(a) and (b) of the Communications Act," and "intrastate termination rates are the business of states." 644 F.3d 410, 414 (D.C. Cir. 2011).

IV. CONCLUSION

For the foregoing reasons, the Commission should deny Vaya's requested ruling.

Respectfully submitted,

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